

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
FRANK G. PIERRET and RICHARD)
HEER (HEER BROTHERS),)
Appellants,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY and)
STANLEY H. SCHELL,)
Respondents.)

PCHB Nos. 894 and 894-A
FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

PER W. A. GISSBERG:

These are two separate appeals, one by each of the above appellants, from "Findings of Fact and Order" of the Department of Ecology directing that a permit for ground water appropriation be issued to Stanley H. Schell.

These appeals came on for consolidated formal hearing before the Pollution Control Hearings Board's Hearing Examiner, William A. Harrison, convened in Wenatchee, Washington, on December 15, 1975.

Appellants, Frank G. Pierret, Richard W. Heer and Harvey L. Heer

1 appeared pro se as did respondent Stanley H. Schell. Respondent,
2 Department of Ecology, appeared by and through its attorney, Joseph J.
3 McGoran, Assistant Attorney General. Witnesses were sworn and testified.
4 Exhibits were admitted. The Hearing Examiner issued a Proposed Decision
5 to which respondents filed exceptions. Having considered the transcript,
6 exhibits and the entire record, the Board makes and enters these

7 FINDINGS OF FACT

8 I

9 Respondent, Stanley H. Schell (hereafter, Mr. Schell), submitted an
10 application for the appropriation of public ground waters to the Spokane
11 Regional Office of DOE on November 5, 1974. The salient points of that
12 application were as follows:

- 13 a. Well of 16 inch diameter by 1000 feet deep.
14 b. Withdrawal of 640 acre-feet per year (1200 GPM).
15 c. Withdrawal between February 1 and November 15.
16 d. Development to begin October 1, 1975 and to end October 1, 1977.
17 e. Purpose of seasonal irrigation.
18 f. Location: NW 1/4, Sec. 6, T 22 N, R 25 E.W.M. in Grant County,
19 Washington.

20 II

21 Although unrevealed by their notices of appeal, appellants claim
22 rights to ground water at the locations and depths as follows:

23 Heer Brothers

24 SE 1/4, Sec. 5, T 22 N, R 25 E.W.M., well: 240 feet, 100 GPM, Dom.
25 and Irrig.

26 NE 1/4, Sec. 4, T 22 N, R 26 E.W.M., well: 415 feet, 10 GPM, Domestic

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NE 1/4, Sec. 4, T 22 N, R 26 E.W.M., well: 105 feet, 100 GPM, Irrig. & Stock.

Sec. 11, T 22 N, R 25 E.W.M., springs, Stock.

Frank G. Pierret

Sec. 4, T 22 N, R 25 E.W.M., well, 80 feet, Domestic & Stock.

SW 1/4 Sec. 33, T 23 N, R 25 E.W.M., well, hand dug, Stock.

Sec. 27, T 23 N, R 25 E.W.M., well, windmill, Stock.

Sec. 27, T 23 N, R 25 E.W.M., well, windmill, 150 feet, Stock.

Sec. 6, T 21 N, R 25 E.W.M., well, 80 feet, Domestic & Stock.

They hold vested water rights of an earlier priority than November 5, 1974, in the vicinity of Mr. Schell's proposed well.

III

Notice of Mr. Schell's application was made by publication in a suitable newspaper circulating in Grant County. On March 12, 1975, the Spokane Regional Office of DOE received a letter in protest of the application from Mr. Richard Heer on behalf of Heer Brothers. On March 25, 1975, a similar letter was received from Mr. Frank Pierret.

IV

During June, 1975, Mr. Howard Powell, Water Resources Inspector for DOE, was dispatched to investigate the Schell application. Mr. Powell spent six hours in the vicinity of the proposed well, primarily viewing pump apparatus already in existence. Powell made no effort to converse with any area residents concerning the application. Neither did he communicate with appellants despite their March letters of protest above.

Mr. Powell used his "experience" to estimate present amounts of

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1 ground water withdrawal, based on the number and type of existing pumps.
2 He later examined the written records of water rights in the area, and,
3 based on all the above, recommended findings favorable to issuance of
4 a permit for the well here appealed. His opinion, uncontroverted by
5 appellants, is that water is available for appropriation. (TR 82 and 92.)

6
7 V

8 Based in part upon Mr. Powell's recommendation, Mr. Lyerla, District
9 Engineer for DOE, issued his written "Provisions and Recommendations"
10 (R-1) on June 20, 1975. Therein the protest letters of appellants
11 were noted and it was proposed that withdrawal be reduced to 186.6
12 acre-feet per year and that withdrawal occur only between April 1 and
13 October 31. The reduction resulted from a determination as to the
14 amount needed to irrigate the quantity of wheat proposed for irrigatio
15 Finally, it was recommended that Mr. Schell's proposed well be "cased
16 out" to guard against seepage impairing adjacent aquifers which serve
17 such persons as appellants. Since surrounding wells tap relatively
18 shallow aquifers (about 200 feet), and the proposed Schell well would
19 extend down 1000 feet, geophysical logging would be conducted to
20 determine to what depth the Schell well must be cased to protect
21 laterally adjacent, shallow aquifers. Such geophysical logging can only
22 occur after the well has been drilled. The proposed well will be cased
23 through any cascading aquifer at least to the static water level.
(TR 50.)

24 VI

25 Based on Mr. Lyerla's "Provisions and Recommendations," (R-1)
26 Mr. R. Jerry Bollen, Assistant Director of DOE, issued his "Findings
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1 of Fact and Order" on June 20, 1975 (R-1). Mr. Bollen found that "all
2 facts relevant and material to the subject application have been
3 thoroughly investigated" and "that water may be appropriated for
4 beneficial use and that said use will not impair existing rights or be
5 detrimental to the public welfare." (R-1.) It was then ordered that
6 a permit issue to Mr. Schell. From that order, this appeal has arisen
7 in which appellants essentially contend that their prior ground water
8 withdrawal rights will be impaired. They made no contention nor proof
9 that water is not available.

10 VII

11 In the area in question, DOE admits that there is a "virtual absence
12 of technical data which would characterize the extent and availability of
the ground water resources proposed to be utilized." (Ex. A-5.) Although
14 Mr. Lyerla recognized that there is "very limited background as far as
15 aquifer characteristics" (TR 27), his opinion is that "given the
16 quantity of water" being sought, respondent's proposed well would "very,
17 very unlikely . . . be a detrimental effect on these (appellants')
18 springs," (TR 28) nor would he expect a "major decline" in the water
19 table (TR 40). While he feels that the draw-down from respondents'
20 wells would not make appellants' wells "totally nonusable" nor dry
21 them up, he admitted that:

22 The pumping during the summer months--the draw-down in these
23 wells and the draw-down in surrounding wells will obviously
24 occur. We do not have data right now to determine exactly
what extent that draw-down will be and what the extent of
the interference from pumping wells in relationship to other
wells will be. (TR 56.) (Emphasis supplied.)

25
26 Nor has DOE ever determined a "reasonable pump setting for . . .

domestic use" (TR 70.) At any event, the testimony of a DOE employee was that the pumping lifts of appellants' wells would be protected "to the extent possible," not to a reasonable pumping lift. (TR 83.)

VIII

Respondent Schell has permits for three other wells which, as of the date of the hearing, had not yet been drilled but when completed could be tested and monitored to provide the information necessary for DOE to make a conscious and considered judgment as to the effect of the proposed well on appellants' water supply. (TR 104.) One test had been run, but it was of no value in determining radius of influence and transitivity. (TR 109.) Because DOE has made no study, it cannot estimate the amount of draw-down on appellants' wells which would be caused by the proposed well. (TR 123.) Proper pumping tests would, however, provide information establishing the radius of influence and its draw-down effect on appellants' wells.

IX

Any Conclusion of Law hereinafter stated which may be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

Appropriation of public ground waters is regulated by chapter 90.44 RCW. The stated purpose of that chapter is to extend to ground waters the law which regulates appropriation of surface waters (RCW 90.44.020). Permits for the withdrawal of public ground water are

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1 governed by RCW 90.03.250 through 90.03.340. (RCW 90.44.060).

2 The statutory section which sets out the legal standard by which
3 permits are to be granted or denied is RCW 90.03.290 which provides, in
4 relevant part, as follows:

5 When an application complying with the provisions of this
6 chapter and with the rules and regulations of the supervisor
7 of water resources¹ has been filed, the same shall be placed
8 on record in the office of the supervisor, and it shall be
9 his duty to investigate the application, and determine what
10 water, if any, is available for appropriation, and find and
11 determine to what beneficial use or uses it can be applied
12 . . . The supervisor shall make and file as part of the
13 record in the matter, written findings of fact concerning
14 all things investigated, and if he shall find that there is
15 water available for appropriation for a beneficial use, and
16 the appropriation thereof as proposed in the application will
17 not impair existing rights or be detrimental to the public
18 welfare, he shall issue a permit stating the amount of water
19 to which the applicant shall be entitled and the beneficial
20 use or uses to which it may be applied . . . But where
21 there is no unappropriated water in the proposed source of
22 supply, or where the proposed use conflicts with existing
23 rights, or threatens to prove detrimental to the public
24 interest, . . . it shall be the duty of the supervisor to
25 reject such application and to refuse to issue the permit
26 asked for . . . In determining whether or not a permit
27 shall issue upon any application, it shall be the duty of the
supervisor to investigate all facts relevant and material
to the application (Emphasis added)

18 Supplemental² to the above laws relating to ground water withdrawal,
19 chapter 90.44.070 RCW places a further, separate and distinct limitation
20 on granting a permit and provides:

21 Limitations on granting permit. No permit shall be granted
22 for the development or withdrawal of public ground waters
23 beyond the capacity of the underground bed or formation in the

24 1. The office and duties of the Supervisor of Water Resources
25 have now passed to the Department of Ecology. RCW 43.27A.180,
26 RCW 43.27A.080, RCW 43.21A.020.

26 2. See RCW 99.44.020.

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1 given basin, district, or locality to yield such water with a
2 reasonable or feasible pumping lift in case of pumping develop-
3 ments, or within a reasonable or feasible reduction of pressure
4 in the case of artesian developments. The supervisor of water
5 resources shall have the power to determine whether the
6 granting of any such permit will injure or damage any vested or
7 existing right or rights under prior permits and may in
8 addition to the records of his office, require further
9 evidence, proof, and testimony before granting or denying any
10 such permits. (Emphasis added)

11 II

12 DOE has not established any reasonable pump lift in the case of
13 domestic wells. We construe the statutes as requiring DOE, before
14 issuing a ground water permit which could effect a prior water right, to
15 determine a range within which pumping lifts would be reasonable for
16 domestic pumping developments. Having failed to do so we believe
17 RCW 90.44.070 requires DOE to deny the application.

18 In Shinn v. DOE, PCHB 648, the department had investigated and
19 studied reasonable pumping lifts,³ determined a range of reasonable or
20 feasible pumping lifts and by the adoption of WAC 173-130 provided
21 for a reasonable or feasible range.

22 In the instant case, DOE does not know nor have an opinion whether
23 the pumping lift will be reasonable or unreasonable as to existing
24 wells generally. Therefore, the permit was issued to respondent Schell
25 in violation of RCW 90.44.070.

26 When and if DOE determines a reasonable pumping lift range, a
27 protestant would have the burden of proving that a given lift would be

28 3. Long-Run Costs and Policy Implications of Adjusting to a
29 Declining Water Supply in Eastern Washington, State of
30 Washington Water Research Center.

1 | unreasonable as to him.

2 | III

3 | The order granting the permit should be vacated and remanded.

4 | IV

5 | Any Finding of Fact herein stated which is deemed to be a
6 | Conclusion of Law is adopted herewith as same.

7 | Therefore, the Pollution Control Hearings Board issues this

8 | ORDER

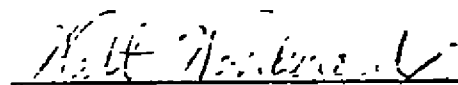
9 | The order granting a permit in this matter is hereby vacated, and
10 | Application G3-23913 is remanded to the Department of Ecology for further
11 | determination in accordance with this decision. The Application shall
12 | retain its established priority date.

DONE at Lacey, Washington, this 22d day of April, 1976.

14 | POLLUTION CONTROL HEARINGS BOARD

15 | 

16 | W. A. GISSBERG, Member

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18 | WALT WOODWARD, Member

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20 | CHRIS SMITH, Chairman

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27 | FINAL FINDINGS OF FACT,
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